

POLICY FOR THE EVALUATION OF CHANGES OR TRANSFERS TO WATER RIGHTS

Resource Contact: Policy and Planning Section

Effective Date: January 8, 1999

Revised: NEW

References: RCW 90.03.380 authorizes the department to approve applications for change or transfer to existing rights; RCW 90.03.390 authorizes the department to approve temporary changes or transfers to existing rights under certain conditions; RCW 90.44.100 authorizes the department to approve certain amendments to existing groundwater rights; and RCW 90.44.105 authorizes consolidation of wells under certain conditions. Several court cases and an Attorney General's opinion referenced in this policy also establish or clarify important legal principles.

Purpose: To document generally applicable policies that the Department of Ecology will use in implementing RCW 90.03.380, RCW 90.03.390, RCW 90.44.100 and RCW 90.44.105. These statutes authorize the department to consider applications to transfer the place of use, change the point of diversion, and/or the purpose of use of existing water rights, as well as the addition of irrigated acres or the addition of uses to existing water rights documented by certificates, permits and water right claims.¹

Application: This policy relates to the evaluation of applications for change or transfer of water right by Ecology or by county conservancy boards pursuant to RCW 90.03.380, 90.03.390, 90.44.100 or 90.44.105 and to add irrigated acres or additional purposes of use to a water right.² POL-1230 addresses the consolidation of wells under RCW 90.44.105 and must be followed in addition to this policy.

This policy supercedes any previous policy statement with which it conflicts.

1. Definitions:

“Amendment,” means the modification, in whole or in part, of a groundwater permit or certificate allowing the construction of additional or replacement well(s) or consolidation of rights associated with uses exempt from permit requirements by RCW 90.44.050 with a legal use or uses that are not exempted under RCW 90.44.050.

“Change,” means a modification or combination of modifications, in whole or in part, of

¹ See Department of Ecology v. Abbott, 103 Wn. 2d 686, 694 P.2d 1071 (1985)

² See POL-1210 for additional policy if it is proposed to add new uses or irrigated acres.

the point of diversion or withdrawal, purpose of use, or a transfer of water right, or other limitation or circumstance of water use. Within this policy, “change” also includes the meaning of “amendment” and the meaning of “transfer”.

“Impair” or “impairment” means 1) to adversely impact the physical availability of water for a beneficial use that is entitled to protection, including earlier filed applications, and/or 2) to prevent the beneficial use of the water to which one is entitled, and/or 3) to adversely affect the flow of a surface water course at a time when the flows are at or below instream flows levels established by rule.

“Reasonably efficient practices,” means those practices including, but not limited to, methods of conveyance, use, and disposal of water which are reasonable and appropriate under the circumstances to bring about beneficial water use without waste³.

“Return flow,” means any water that is appropriated using reasonably efficient practices and subsequently returns to the stream from which it is diverted, or to some other stream, to a body of groundwater, or that would do so if not intercepted by some obstacle or another appropriation.

“Seasonal change,” means any temporary change or transfer proposal or its approval to change, amend, or transfer the place of use or point of diversion/withdrawal of water right for a specified part of the year. A seasonal change is subject to this policy and is proposed in the same manner as any other modification of a water right.

“Temporary change,” means to change, amend, or transfer the place of use or point of diversion/withdrawal of water right for a limited period of time or until a specified circumstance is met. A temporary change is subject to this policy and is proposed in the same manner as any other modification of a water right.

“Transfer,” means a modification, in whole or in part, of the place of use of a water right.

“Water waste,” means water that is diverted or withdrawn in excess of the amount required for beneficial use based upon reasonably efficient practices. The waste of water is a violation of the water code and is subject to regulation by the department.

2. Seasonal changes or transfers and temporary changes or transfers are subject to this policy.

Evaluation of seasonal or temporary changes and transfers must follow this and other applicable policy. Seasonal or temporary changes shall not be issued to permanent projects as a means of avoiding the application processing waiting period. See PRO-

1000 for processing guidance concerning seasonal and temporary changes or transfers.

3. The water right proposed to be changed will investigated.

- (a) The department will investigate the water right and make a tentative determination of the extent to which a water right actually exists and is valid for change³. The tentative determination shall consider the legal authority to have perfected a right, the means by which the right was originally established, the historical development and use of water, and the practices employed to divert, convey and use water. The tentative determination shall not recognize a water right in excess of the amount historically put to beneficial use in compliance with state water law and applicable rules. No water quantities shall be recognized beyond the amount necessary to accomplish the beneficial use employing reasonably efficient practices. Water use in excess of the quantities necessary using reasonably efficient practices constitute water waste.
- (b) The department may require information beyond that required in the application from the applicant necessary to evaluate the application for change or transfer. The department will provide a reasonable time for the applicant to submit the required information.
- (c) The department will determine, in accordance with Policy 1060, whether the water right has been abandoned as a matter of common law or is subject to relinquishment as provided by Chapter 90.14 RCW.
- (d) Reasonably efficient practice evaluations are made on a case by case determination that may recognize that water is diverted in a quantity that compensates for inefficiencies, not exceeding those which are typical for the diversion/distribution systems being employed. An evaluation of reasonably efficient practices includes consideration of prevailing local practices and custom; and the adequacy of system maintenance.⁴

4. Consideration for evaluating change proposals

- (a) Impairment considerations: Any proposed change or aspect of a proposed change is subject to denial or conditioning if it would impair any other water right or any previously filed application. To evaluate the potential for impairment to occur, a tentative determination of the extent and validity of the other potentially conflicting water rights must be made. Any tentative determination will be made in the manner outlined by this policy for a tentative determination of the water right proposed for change or transfer.

³ See Rettkowski v. Department of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993).

⁴ See Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

- (b) Public interest considerations: An application cannot be approved if approval would directly conflict with any statute or rule or would be a detriment to the public interest.
- (c) Historic use considerations: A water right or portion thereof that has not been previously put to beneficial use may not be changed.⁵ Exceptions can be considered with regard to changing the point of withdrawal or place of use authorized by a groundwater permit.
- (d) Exempt Groundwater withdrawals: A groundwater right based upon a beneficial use pursuant to the exemption from permit requirements provided under RCW 90.44.050 may not be authorized for change unless such authority is specifically granted to the department by statute. A groundwater right for the purposes and water quantities described by the groundwater exemption from permit that predates the state groundwater code, RCW 90.44, for which a permit or certificate has not issued may not be authorized for change unless such authority is specifically granted to the department by statute.⁶ One such authority is contained within RCW 90.44.105, which authorizes the consolidation of permit exempt groundwater uses with another groundwater right that is based upon a permit or certificate.⁷
- (e) Enlargement: The amount of water appropriated, either on an instantaneous basis or cumulatively during a period of use, cannot be increased through a water right change. The acreage authorized to be irrigated under a water right, as tentatively determined by the department is a limitation under the right to irrigate and may only be increased in accordance with RCW 90.03.380 (1).⁸ Policies and procedures relating to adding additional irrigated acres are contained in POL 1210 and PRO-1000.
- (f) Season or period of use: The department may authorize changes in the season of use of water if, in addition to any other applicable public interest or impairment consideration for a change⁹:
 - (i) Altering the period of use is related to and necessary to effect another proposed change in the right (e.g. changing the purpose of use);

⁵ See Okanogan Wilderness League v. Town of Twisp, 133Wn, 2d 769, 947 p.2d 732 (1997).

⁶ See AGO 1997 No. 6.

⁷ See Policy No. 1230.

⁸ See Schuh v. Ecology, 100 Wn. 2d 180, 667 P.2d 834 (1984); Kummer v DOE, PCHB No. 85-188 (1987); Benningfield v DOE, PCHB No. 87-106 (1987). RCW 90.03.380 was amended in 1997 to allow conserved water to be used on additional land if the amount consumptively used would not be increased.

⁹ See R. D. Merrill Co., et. al. Vs State, Pollution Control Hearings Board, et. al., No. 64607, (Slip op., January 7, 1999)

- (ii) The net effect on streamflows and instream values must be neutral or positive. A reduction in streamflows during part of the year may be allowed if it is offset by an increase in streamflows during another time of year provided that the overall net effect on instream resources is positive. Ecology will consult with the state Department of Fish and Wildlife and other fishery and habitat managers as appropriate for assistance in making determinations related to effects on water bodies.
- (iii) Mitigation of any impacts to existing rights or streamflows is the responsibility of the party requesting the change. Mitigation proposals should be provided in writing as part of the application. Mitigation proposals may also be received after impacts to existing rights or instream flows are identified. The department will consider reasonable and credible mitigation proposals in accordance with existing law.
- (g) Limitations in the change of return flows: A change to a water right may not generally cause a reduction in return flow without a balancing reduction in the diverted or withdrawn water quantity. Any reduction in return flow may not impair another water right dependent upon that return flow or have an adverse effect to the receiving water source. This policy statement does not preclude the recapture and reuse of water by the original appropriator for authorized use(s).

The following are typical examples of return flows when water is used employing reasonably efficient practices:

- (1) Water applied to land in excess of the soil water holding capacity.
- (2) Water lost in conveyance that, if not intercepted, would return to a water source.
- (3) Water discharged at the end of a diversion system that, if not intercepted, would return to a water source.
- (4) Water discharged as operational spill(s) that, if not intercepted, would return to a water source.
- (5) Water that is used for fish by-pass purposes.
- (6) Effluent from a sewage treatment system that has historically been discharged to a fresh water body.

5. Changes, if approved, may include conditions.

Conditions to ensure that the beneficial water use continues to be exercised in water quantities not greater than those historically perfected and reasonably necessary, without

an increase in annual consumptive quantity, and without impairment of existing rights or detriment to the public interest may be placed upon any approval of a change.

Conditions may include, as appropriate, metering requirements, limitations in season of use, instream flow protection requirements, limitations on the crops to be grown, or specifications for system design and/or operation.

6. Mitigation.

The department must consider an applicant's proposals to mitigate adverse effects on other water rights, streamflows, and/or the public interest if submitted prior to the issuance of a decision.¹⁰

7. A Report of Examination will document the investigation and an order shall document the decision and authorize the change to occur if approved.

The department will consider and address in a report of examination, as appropriate, at least the following:

- (a) A description of the water right proposed for change or transfer and the tentative determination as to the validity and quantification of right(s), together with a description of the historical/water use information that was considered;
- (b) A description of any protests, objections or comments including comments provided by other agencies, Indian Tribes, or interested parties and the department's analysis of each issue raised.
- (c) A discussion explaining compliance with the State Environmental Policy Act.
- (d) An analysis of the effect of the proposed change or transfer on other water rights, pending applications, and instream flows established under state law;
- (e) A narrative description of any other water rights or other water uses associated with either the right as currently authorized or the right as proposed to be changed and an explanation of how those other rights or uses will be exercised in harmony with the right proposed to be changed;
- (f) An analysis of the effect of the transfer on the public interest;
- (g) Any recommendation or conclusion that an existing water right or portion of a water right has been forfeited due to non-use;
- (h) A description of the results of any geologic/hydrologic investigations that were considered;

¹⁰ See Department of Ecology v. Theodoratus, No. 64527-2, (Slip Op., July 2, 1998)

- (i) A list of conclusions drawn from the information related to the transfer proposal and a complete description of the department's decision;
- (j) Conditions and limitations recommended for placement on an approval or other corrective action necessary to maintain the water use in compliance with state laws or rules;
- (k) A description of any requirement to mitigate adverse effects on other water rights, the water source, or the public interest;
- (l) A schedule for development and completion of the change or transfer if approved in part or in whole, that includes a definite date for completion of the change and the application of water to authorized beneficial use.

An order documenting the decision of the department shall be issued with the Report of Examination. If the proposed change is approved, the order represents authority to proceed with the change under the conditions and as provided within the decision and Report of Examination.

8. Documentation of a completed authorized change or transfer.

The appropriate document certifying that the change or transfer was accomplished as authorized shall not be issued until the change or transfer has been physically completed and water fully put to use to the extent necessary in accordance with the authorization¹¹. See PRO-1000 for guidance concerning the documentation of a completed change or transfer of a water right.

/s/ Keith E. Phillips

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Special Note: These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

¹¹ See Procedure PRO-1000.